



JAN-06-2004 10:54

DIDP

DEPARTMENT OF HEALTH & HUMAN SERVICES

3018274576 P.02/02
Public Health Service

Food and Drug Administration
Rockville MD 20857

Re: Xoponex
Docket No. 99E-5116

The Honorable James E. Rogan
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
Box Pat. Ext.
P.O. Box 2327
Arlington, VA 22202

DEC 30 2002

Dear Director Rogan:

This is in regard to the application for patent term extension for U.S. Patent No. 5,362,755 filed by Sepracor, Inc., under 35 U.S.C. § 156. The human drug product claimed by the patent is Xoponex (levalbuterol), which was assigned new drug application (NDA) No. 20-837.

A review of the Food and Drug Administration's official records indicates that this product was subject to a regulatory review period before its commercial marketing or use, as required under 35 U.S.C. § 156(a)(4). Our records also indicate that it represents the first permitted commercial marketing or use of the product, as defined under 35 U.S.C. § 156(f)(1), and interpreted by the courts in *Glaxo Operations UK Ltd. v. Quigg*, 706 F. Supp. 1224 (E.D. Va. 1989), *aff'd*, 894 F. 2d 392 (Fed. Cir. 1990).

The NDA was approved on March 25, 1999, which makes the submission of the patent term extension application on May 21, 1999, timely within the meaning of 35 U.S.C. § 156(d)(1).

Should you conclude that the subject patent is eligible for patent term extension, please advise us accordingly. As required by 35 U.S.C. § 156(d)(2)(A) we will then determine the applicable regulatory review period, publish the determination in the *Federal Register*, and notify you of our determination.

Please let me know if we can be of further assistance.

Sincerely yours,

Jane A. Axelrad
Associate Director for Policy
Center for Drug Evaluation and Research

cc: Harold C. Wegner
Foley & Lardner
Washington Harbour, Suite 500
3000 K Street, NW
Washington, DC 20007-5109